IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1097 OF 1988

The State of Maharashtra. .... Appellant.

Versus.

1. Kasam Ali @ Vasim Ali Masnd Shaikh
Age about 23 years, residing at
Talap Ramnath Sarang Chawl,
Mulgaon, Vasantiput, Tal.& Dist.
Devria, Uttar Pradesh.

2. Rambharose Ramachal Yadav,
Age about 23 years, R/o.C.P.Talav,
Wagle Estate, Thane, original
resident of Belvaraja,Tal. Basti,
Uttar Pradesh. .... Respondents.

Shri D.S.Mhaispurkar for the Appellant.

Shri Ganesh Gole holding for Shri A.P.Mundargi for the Respondent No.1.

CORAM ; SMT.RANJANA DESAI, &
ABHAY S. OKA, JJ.

DATED : 25th October, 2004.

ORAL JUDGMENT (Per Abhay S.Oka, J.)

1. By this appeal against acquittal, the State of Maharashtra has taken exception to the Judgment and order dated 11th November 1987 passed by the learned 2nd Addl.Sessions Judge, Thane, by which the Respondents/Accused were acquitted of the offences punishable under sections 363, 366 and 376 read with

section 34 of the Indian Penal Code ("IPC" for short). The case of the prosecution is that on 12th December 1986 at about 18.00 hours the Accused kidnapped one Rekha Ramnath Saroj from the lawful guardianship of her father Ramnath Timnal Sarog. Further allegation against the Accused is that they kidnapped the minor girl in order that the said minor girl will be forced to have illicit intercourse. The allegation against the Accused No.1/ Respondent No.1 is that he committed rape on the minor girl thereby committing offence under section 376 read with section 34 of the IPC.

2. The prosecution examined five witnesses. P.W.1 Ramnath is the father of the minor girl. P.W.2 is Rekha the alleged victim of the offence. P.W.3 is Ramnavam Siddhinath Singh, who is the Deputy Headmaster in the School in which the P.W.2 Rekha was studying. P.W.4 Dr.Ram Marotrao Gundale is the Medical Officer who examined the victim. P.W.5 Raibhan Devram Patil is the investigating officer.

3. Shri Mhaispurkar, the learned A.P.P. submitted that there was a clinching evidence on record in the form of school record of the victim which established that the date of birth of the victim was 21st January 1973 and therefore, on the date of incident i.e. 12th December

1986 she was only 13 years old. He submitted that the medical evidence also supports the prosecution. He submitted that the medical evidence shows that her age was less than 16 years on the date of the incident. He submitted that the evidence of the prosecutrix was very consistent and there was no reason to disbelieve the said evidence. He submitted that in view of the well settled law, the sole testimony of the prosecutrix was sufficient to convict the accused. He submitted that the findings recorded by the learned Sessions Judge were perverse.

4. Shri Ganesh Gole appearing for the Respondents submitted that the primary evidence of date of birth was not produced by the prosecution. He submitted that the evidence of the Medical Officer itself shows that the age of the victim was more than 16 years on the date of incident. He contended that the evidence of the prosecutrix itself proves that with full consent she accompanied the Accused to Gauhati and even the alleged intercourse was with her consent. The evidence of the prosecutrix shows that she had number of opportunities to protest when she was taken by the Accused from place to place and in fact she never protested. He submitted that the learned Sessions Judge has taken the only possible view of the matter.

5. We have carefully considered the submissions made by the learned Counsel appearing for the parties. Before we deal with the submissions, it is necessary to refer to the evidence on record. P.W.1 Ramnath deposed that he married in the year 1971 and Rekha is his first daughter born in the year 1973. He stated that his daughter Rekha was born in village Katrasujangan in District Jodhpur in the State of U.P. He stated that two to three years after 1977 his daughter Rekha was admitted to the Municipal Hindi School at Checknaka, Mulund, Mumbai. After she failed in the 5th standard she left the School.

6. He stated that when he returned from duty at 8.00 p.m. on 12th December 1986 one Lalji Sharma informed him that the Respondent No.1 Kasam eloped with his daughter and she has been taken away. P.W.1 immediately rushed Waghle Estate Police Station at Thane and lodged a complaint. He started search for his daughter. He stated that both the Accused were residing in his neighbourhood. He went to village Devriya, District Gorakhpur, U.P. which is the native place of the Respondents. At the native place of the Accused, he was informed by one person that his daughter Rekha was in Assam where she was taken by both the Accused by

practicing deceit. P.W.1 stated that after getting the said information he returned to Thane and after some days along with the Police went to Assam. Though he stayed at Assam for seven days, he could not trace his daughter. After he returned to Thane, the Police could locate his daughter and she was brought to Thane.

7. In his cross-examination, P.W.1 admitted that his wife gave the date of birth of the daughter while taking admission in School. He admitted that he did not enquire about the date of birth of his daughter. He admitted that his wife does not know reading and writing. He denied the correctness of the suggestion that there was a love affair between his daughter Rekha and the Respondent No.1. He denied that as he did not like his daughter's love affair with the Respondent No.1, he used to beat her daily. He stated that the Accused No.2 was working as a cleaner with Accused No.1 who was a driver. In the F.I.R., P.W.1 has not disclosed the name of Accused No.2.

8. P.W.2 Rekha stated that she knew the Respondents Nos.1 and 2 who were neighbours. She stated that on the date of incident at about 6.00 p.m. Accused No.1 came to her house when her both parents were not present. She stated that the Accused No.1 informed that her

father had met with an accident and therefore, he requested P.W.2 to accompany him. However, she refused to accompany Accused No.1. The Accused No.1, therefore, came back after sometime and gave "prasad" to her. Initially she declined to eat the same. When the Accused informed her that a son was born to him, she ate prasad. She stated that thereafter she lost consciousness and when she regained consciousness, she found herself in a train with the Accused. She stated that she started crying. She told the accused to take her back to her house. She stated that both the accused threatened her by showing her a knife and warned her that if she shouts they would kill her. She stated that the accused brought her to Gauhati where they stayed for six days. She stated that the Accused used to beat her during her stay at Gauhati. She stated that the Accused had intercourse with her. She used to sleep with Accused No.1 on one room and the Accused No.2 used to sleep in another room. She stated that the Accused No.1 thereafter took her to the house of one of his relative and by leaving her there, he went to Nagaland. She stated that she stayed at the place of the relative for 25 days. She stated that when the Accused No.1 returned, he took her to Nagaland where they stayed for five to six days in the house of one woman. At that place the Police came and she was taken to Thane.

9. In the cross-examination P.W.2 admitted that she has stated to the Police that she used to talk to the Respondent No.1 and she had a love affair with him. She also admitted of having stated before the Police that as she used to talk to Accused No.1, her parents used to beat her and that she had decided to run away with the Accused No.1. She further admitted of having stated before the Police that Kasim made her to sit in an autorickshaw and brought her to Bombay Central where they stayed for a night in a lodge. She also admitted that she stated before the Police that she accompanied the Accused No.1 to Gauhati where they performed marriage. She stated that the marriage was against her will. She stated that all the statements which she made before the Police were at the instance of the Accused. She also admitted of having stated before the Police that she and the Accused No.1 lived as husband and wife. She admitted that before the Registrar her age was disclosed as 21 years. She stated that she gave the statement before the Police in presence of the Accused and out fear of Accused, she stated several things.

10. She admitted that she did not tell the Police that Accused No.1 had brought something to eat by telling her that it was 'prasad' and that after eating the same she

became unconscious. She stated that she did not state before the Police that she started weeping in the train and that the accused beat her.

11. P.W.3 Ramnavam Siddhinath Singh is the Headmaster of the Municipal Hindi School at Mulund. He stated that P.W.2 Rekha was admitted in the School on 18th June 1986. Entry in the School admission register shows that her date of birth as 21st January 1973. In the Cross-examination he stated that the date of birth is mentioned in the Register as per the information given by the parents. He stated that the application form is signed by the parent containing all the details. He however, did not produce the application form. Exh.20 is the extract of register produced by him which shows that P.W.2 Rekha was admitted in the School on 18th June 1986 and she left the School on 30th August 1986 and she was studying in the 5th standard. The remark in the School Leaving Certificate at Exh.21 shows that P.W.2 was continuously absent.

12. P.W.4 is Dr.Ram Gundale. He stated that he examined the girl on 12th December 1987. After examining the X-ray plates of right shoulder, elbow and wrist, according to his opinion the age of the girl was between 14 to 16 years. In the cross-examination he

admitted that he was not a radiologist and he had not taken X-ray of the girl. He stated that the X-ray was taken by the X-ray Technician. He stated that if epiphysis and metaphysis of the elbow joint are fused the age is more than 14 years. He again stated that if epiphysis of the lower end of the radius of ulna is fused with the metaphysis, the age is more than 17 years in case of a male and 16 years in case of a female. He however stated that from the X-ray plate of the girl he found that epiphysis and the metaphysis of the elbow joint are fused indicating that her age was above 14 years. He proceeded to state further that if epiphysis of the lower end of the radius and ulna are not fused with the metaphysis, it indicates that the age is below 16 years. He stated that if the age is above 18 years there will not be separation line of epiphysis and metaphysis of radius and ulna. He admitted that in case of P.W.2 Rekha there was a fusion of epiphysis and metaphysis and thus if we go by his evidence, the age of the girl may be more than 18 years. He stated that there were 28 teeth in the mouth of the girl. He stated that if there are 28 teeth the age is upto 18 years if the teeth are considered as the sole criteria for determination of the age.

13. The Medical Certificate at Exh.23 discloses that

P.W.2 was examined on 27th February 1987 by Dr.P.D.Ambekar. He stated that there were no marks of violence, scratches, abrasions in breast, vulva and perineam. He stated that hymen was absent and there were no fresh tears. He stated in the certificate that one finger P.V. was easily possible. In the said certificate, a reference is given to X-ray taken on 27th February 1987. It is recorded that radiologically P.W.2's age appears to be above 18 years and below 20 years. He recorded a conclusion that there is no positive evidence of rape on her person. The certificate is signed by Dr.P.B. Ambekar. It is significant to note that the prosecution has not examined Dr.Ambekar though Dr.Ambekar was the Medical Officer who had examined P.W.2. P.W.4 Dr.Ram Gundale had examined P.W.2 7 months thereafter only for the purpose of ascertaining her age.

14. P.W.5 Raibhan Patil, who is the Investigating officer stated that the statement of P.W.2 was recorded on 26th February 1987. In the cross-examination, he stated that P.W.2 was not ready to go to her parents. He further stated that when her statement was recorded in the Police Station one lady constable was present. He admitted that P.W.2 stated before him that prior to the incident she had sexual relations with the

Respondent No.1. He stated that during the course of investigation, it was transpired that the Respondent No.1 and P.W.2 Rekha had married and they had executed document which was registered before the Registrar which disclosed her age as 21 years.

15. As per the case of the P.W.2, from Bombay she was taken in a train upto Gauhati. If she had really cried or protested in the train journey which was fairly long, attention of the other passengers could have been easily diverted to her. It is very difficult to believe her version that the Accused had threatened her in the train by showing a knife. She admitted that she stayed with the Accused No.1 at Gauhati for six days. Thereafter Accused No.1 left her in the house at Gauhati and Accused No.1 was away for 25 days in Nagaland. She has not stated that Accused No.2 was with her for the said period of 25 days. It is surprising that for a long period of 25 days she did not protest in any manner with any one. After the said period of 25 days, she admittedly went with the Accused No.1 to Nagaland where she stayed for few days. Though P.W.2 was taken by the Respondent No.1 for a long journey by a train from Bombay to Gauhati and thereafter from Gauhati to Nagaland, it seems that the P.W.2 never protested. The medical certificate of Dr.Ambekar which is produced by

the prosecution discloses that there were no signs of rape on the body of P.W.2. The medical certificate issued by Dr.Ambekar indicates that she was habituated to sexual intercourse. The Investigating officer Patil stated before the Court that P.W.2 was not ready to stay with her parents and during the investigation it was revealed that P.W.2 had married with Accused No.1 and at the time of marriage she disclosed her age as 21 years. With this evidence on record, we find it very difficult to believe that the Accused had taken P.W.2 firstly to Gauhati and thereafter to Nagaland without her consent and that the Respondent No.1 had a forcible intercourse with her.

16. The prosecution has heavily relied upon the extract of School register produced by P.W.3. It is an admitted position that the entry of date of birth was made in the School record on the date of admission i.e. on 18th June 1986 at the instance of the mother of the P.W.2. The prosecution has not produced any primary evidence of date of birth such as extract of birth register maintained by competent authority. The prosecution has not examined the mother of the P.W.2. The P.W.1, the father of P.W.2, stated that he married with the mother of P.W.2 in the year 1971. No documentary evidence of the said fact is produced by the prosecution. If the

primary evidence in the form of birth extract was not available, the prosecution could have produced record of the School in which P.W.2 took evidence before joining the Municipal Hindi School at Mulund. It is pertinent to note that when P.W.2 was admitted in the Municipal Hindi School, she had taken education upto 4th Standard. Therefore, she must have taken earlier education in some other School. Failure to produce the record of the said School is very significant.

17. When the prosecution produced the certificate at Exh.23 issued by Dr.Ambekar, it was necessary for the prosecution to examine the said Medical Officer. However, he has not been examined. The certificate discloses that the radiological examination shows that the age of the prosecutrix must be above 18 years and below 20 years. The evidence of P.W.4 is inconsistent. He has given different versions at different places. He has stated that if the epiphysis and metaphysis of the elbow joints are fused the age must be more than 14 years. He further stated that in such a case the age of a female can be more than 16 years. He also admitted that if there is no separation between epiphysis and metaphysis, the age can be more than 18 years. He also admitted that from X-ray plates of P.W.2, it was found that the epiphysis and metaphysis of the elbow joints

were fused. Dr.P.D.Ambekar in the certificate at Exh.23 has stated that her age on 27th February 1987 i.e. two months after the incident was more than 18 years and below 20 years. From the evidence of P.W.4 it is possible to infer that the age of P.W.2 could be more than 18 years on the relevant date. It is impossible to record a finding that on the date of the incident the age of the P.W.No.2 was less than 16 years.

18. If this is the scenario which emerges after the examination of evidence on record, it is impossible to come to the conclusion that the guilt of the Accused was established beyond reasonable doubt. We find that the learned Sessions Judge has considered each and every piece of evidence on record and has come to the same conclusion which we have arrived at .

19. In the circumstances there is no merit in the appeal and the same is dismissed. Bail bond of the Respondents stands cancelled.

(Smt.Ranjana Desai, J.)

(Abhay S.Oka, J.)